Revisiting the Prohibition of Private Practice for Public Officers in Nigeria and its implication on provision of technical services: The Case of Law Lecturers

By

Bethel Uzoma Ihugba*, Shuaibu Danwanka and Samuel Oguche***

ABSTRACT

The purpose of this paper is to explore the issue of private practice while working in the public service, using law lecturers as case study. The paper explores this question relying on critical analysis of legislative provisions and the rationale behind attempts at prohibiting this practice. To put the debate in context and understand the universality or otherwise of the position canvassed, examples are drawn from two other jurisdictions with regulatory frameworks on second employment. The paper finds that the main concern of law makers is conflict of interest and how it can be managed where it arises. The paper concludes that total prohibition is not the best approach and that management of conflicts of interest are possible in the Nigerian through regulations and policy guidelines. The paper also makes suggestions of better alternative legislative provisions with particular reference to Nigeria.

Key Words*: Conflict of Interest, Private Practice, Second Employment, Public Service*

INTRODUCTION

Legal education, like most professional education, involves a balanced combination of practice knowledge and (theory) legal knowledge. This supposedly calls for a skill set that equips the law lecturer to teach law practice, legal doctrines and principles. This means that the law lecturer should ordinarily also be an active legal practitioner; a second job from where to develop practice experience with which the lecturer feeds his other profession as a law lecturer.

To explore these questions, the paper is structured as follows. The first section which is the introduction. Next section examines the law in Nigeria on second employment for public officers, with particular reference to law lecturers also working as lawyers. This is followed by a discussion on the best approach to resolve the seeming contradictions and challenges in the law. Finally, in

* LLB, LLM, PhD, BL – Research Fellow, Legal Research Division, National Institute for Legislative and Democratic Studies, National Assembly Abuja. bethelihugba@yahoo.com

** LLB, LLM, PhD, BL –Legal Adviser, National Institute for Legislative and Democratic Studies, National Assembly Abuja

the conclusion and recommendation section which specifically recommends some legislative amendments.

THE LAW ON PRIVATE PRACTICE AND LECTURERSHIP IN NIGERIA

According to Section 2(b) of Fifth **Schedule,** Code of Conduct for Public Officers provided under the Constitution of the Federal Republic of Nigeria 1999 (CFRN) as amended, public officers are not allowed to engage in private practice with exception to farming. Section 2(b) provides thus: "*Without prejudice to the generality of the foregoing paragraph, a public officer shall not-…(b) except where he is not employed on full time basis engage or participate in the management of or running of any private business, profession or trade but nothing in this sub-paragraph shall prevent a public officer from engaging in farming*. This provision is significant in two ways. These are its coverage of all public officers and its prohibition of "*private business, profession or trade",* Public *officers* include both professionals and non-professionals working for the government in any capacity. Section 19 of the Code of Conduct for Public Officers, under the CFRN 1999 defines public officer as "*a person holding any of the offices specified in Part II of this Schedule*". Under this Schedule 11, 16 groups of public offers are identified. Amongst these groups, the group relevant to this paper is identified as: "*All staff of universities, colleges and institutions owned and financed by the Federal or State Governments or local government councils*"

There are arguments that this provision of the Constitution does not apply to law lecturers. This argument is based on the provision of the Regulated and other Professions (Private Practice Prohibition) Law Lecturers Exemption (NO. 2) Order 1992. This order was made to relax the provision of the Decree no 84 of the Federal Military Government of General Ibrahim Babangida. The Decree had prohibited public officers from engaging in private practice, subject to some limited exceptions. The Decree under section 1(5), however, empowered the President to by order vary the list of professionals or government officers covered by this law. Since the President was, in effect at that time, the Legislature, any order issued by him had the effect of law. If this be the case, it can therefore be argued, as contended by some, that the Order is an extant Statute and therefore continues to exempt law lecturers from the prohibition from private practice.

The other argument however, is that the Order was repealed along with its parent law by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No 63 of 1999 and thereby has no legal value (Rebecca E. B., 2007 : 6-7). This interpretation is further supported by the provision of the *section 1 (2) and (3) of the CFRN 1999* to the effect that: "*This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria"* **and,** *"If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void"*

The contradictions arises from the provision of section 2(b) of the Code of Conduct for Public Officers provided under the Constitution of the Federal Republic of Nigeria 1999 (CFRN). Also ***Section 16(1) (d)*** appear to support this interpretation because it is in favour of gainful economic engagement of citizens in that it provides that (*1) The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution. (d) without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy*. This provision does not contemplate a blanket prohibition against second employment.

The second significant wording of section 2(b) is the use the words "private business, profession or trade". These wordings are quite broad and sweeping. This is because the constitution failed to define *private business, profession or trade,* suggesting it is also a blanket prohibition of any such business, profession or trade irrespective of whether it has any impact on the competence, fair judgement, and professionalism of the public officer. This is an area that may need resolution.

Implications of the prohibitions

Assuming, but not conceding, that the provisions of the Constitution bans all private practice by public officers, the questions therefore is how does this affect service delivery. To answer this question it may be instructive to recall the effect of the ban by the 1984 Decree and the rationale for the amendment by the 1992 order.

Evidence showed that upon the ban, there was massive exodus of lawyers from lecturing positions (Rebecca E. B., 2007: 3). This was seen as an unanticipated negative to the intent of the ban. The perception was that if the exodus was not stemmed, it would greatly and irreparably affect the quality of lawyers. This is in consonance with the argument that most law students learn from the conduct of their law teachers and the best way to learn is from law teachers who actually have the opportunity to practice law and display the right professional conduct to their students (Norman, (1980: 624)). In the case of Nigeria, poor quality law lecturers due to lack of practical experience of the law will inevitably affect the quality of lawyers that will end up working for the government and or as private practitioners (Okolie (No Date): 6)).

The other argument was that exposure to active private practice keeps lecturers abreast with the latest issues challenging the law, opens up opportunity to introduce ideas that will develop the law and contribute to law reform (Albertet al., (1912: 256)). It gave them real and firsthand experience of the effect of legislation on society and there interpretation and application by courts. This experience are then applied in the teaching of law students (Albert et al., (1912: 256)). It has been argued that law lecturers owe students and society to teach in such a way that

students understand the practical implications of law on society and how the negative impacts can be reduced (Okolie ((No Date):): 6). This duty cannot be effectively performed by lecturers who have no practical experience of the implications of law and how it operates in society (Norman (1980: 628)).

This raises the question of why the attempt to stop law lecturers from active legal practice. Although this is not stated in the Code of Conduct provisions, the answer can be deciphered from *Rules of Professional Conduct for Legal Practitioners*. For instance, *Rule 8 of the Rules of Professional Conduct for Legal Practitioners 2007*, conduct provides as follows:

> *8. ----- (1) A lawyer, whilst a servant or in a salaried employment of any kind, shall not appear as advocate in a court or judicial tribunal* ***for his employer*** *except where the lawyer is employed as a legal officer in a Government department.*
> *(2) A lawyer, whilst a servant or in a salaried employment, shall not prepare, sign, or frank pleadings, applications, instruments, agreements, contracts, deeds, letters, memoranda, reports, legal opinion or similar instruments or processes or file any such document* ***for his employer.***
> *(3) A director of a registered company shall not appear as an advocate in court or judicial tribunal* ***for his company.***
> *(4) A lawyer in full-time salaried employment may represent* ***his employer*** *as an officer or agent in cases where the* ***employer*** *is permitted by law to appear by an officer or agent, and in such cases, the lawyer shall not wear robes.*
> *(5) An officer in the Armed Forces who is a lawyer may discharge any duties devolving on him as such officer and may appear at a court martial as long as he does so in his capacity as an officer and not as a lawyer*.

A careful look at the above provisions discloses the major objectives of the Rules are to avoid monopoly of work for salaried in-house legal practitioners and reduce the opportunity for, and any semblance of, conflict of interest between the practice of law and the rendering of professional service to an employer (Abdulkarim (2015:16)*)*. It seeks to ensure that such lawyers are objective and fair in their representation of their employer. This is because, in reality, the above provisions does not restrict private practice but rather restricts the rendering of private practice to an employer. This means therefore that the rendering of private practice to any person other than an employer is permissible within the provisions of the *Rules of Professional Conduct for Legal Practitioners* (Abdulkarim (2015.:16)).

It is thus argued that, the provision of section *2(b) of the Code of Conduct for Public Officers* provided under the Constitution of the Federal Republic of Nigeria 1999 (CFRN) should be read

in the same spirit. Thus the question should be whether there is an opportunity for conflict of interest while practicing as a lawyer and at the same time lecturing. If the answer is in the negative, then there should be no reason a lawyer should be estopped from legal practice simply because he or she is also a lecturer. However, if on the other hand, there is potential for conflict of interests, two questions arise thus:

1. Is there a need for a lawyer in legal practice to also work as a lecturer?
2. Is there anyway the conflict of interest can be resolved or avoided without estopping legal practitioners from legal practice?

These questions are addressed below as:

The need for a lawyer in legal practice to also work as a lecturer.

The answer to the above question is in the affirmative. This is a practice generally accepted. Over 50% of law lecturers are also practicing legal practitioners. These group of lawyers range from the most junior legal practitioners to the most senior. A roll call of senior advocates of the federation indicates that a good number of them are also senior academics and professors of law. Thus if these group of practitioners can gain excellence in two different fields of service, lecturing and practicing, then it is a path worth following.

The other important benefit is that active legal practice helps to horn the skill of a lawyer either as a solicitor or a barrister. This is the skill set a law lecturer is expected to impact on law students. It will be detrimental for a lawyer who has no experience of how the law operates and impacts on everyday life of individuals to educate future lawyers. The result will likely be the churning out of lawyers who cannot practicalise the theories they are taught.

The importance of continued practical experience is demonstrated in many law lecturer adverts in countries like the UK, Canada and the USA. Most law lecturer adverts in the UK require a lawyer with years of practice experience who still have the right to appear before a court of law. In fact registration with Solicitors Regulation Authority (SRA) in England and Wales is a prerequisite for most law lecturer positions, especially with regards to law lecturers in undergraduate programmes. An example is an advert for a law lecturer in Dispute Resolution, Professional Development programme at the University of Law London, requires that the candidate must "… will be a qualified solicitor or barrister with a genuine passion for quality and excellence, who can demonstrate successful legal practice experience"(The University of Law London, (2018: 1)).

The other aspect is that under the Nigerian constitution the state has a duty of harnessing the resources of the nation for the benefit of all in the society while citizens have the civic duty and fundamental right of every Nigerian to contribute the best he or she can to the country and to

benefit the most, he or she can, from hard work without jeopardizing the interests of others (See Sections 16, 23 and 24 of the Constitution of the Federal Republic of Nigeria 1999). In other words, a healthy adult is free to engage in extra work of their own free will as far as no other person is not unduly deprived of work. The provision against second employment is obviously not in aid of these duties of harnessing natural resources and of full participation in all areas of the economy.

Resolving the conflict of interest problem with a Second Employment

As demonstrated above, generally speaking engaging in private business, profession or trade while working as a public officer is a civic duty that should be encouraged. However, its prohibition in the Nigerian constitution suggests there are instances when such duty may run afoul of moral and statutory provisions. An example is when there is real or perceived conflict of interest. Careful research on the laws and codes of conduct against private practice or outside employment in other jurisdiction appear to show only this one peculiar circumstance. This means there is need to re-evaluate what consists a "private business, profession or trade" or qualify the words for the purpose of Section 2(b) of the Code of Conduct for Public Officers. Examples for the purposes of this paper are the Kenyan Law and the Canadian Employees code of conduct. Explanations of the positions in these two jurisdictions is demonstrated below.

(a) Kenyan Law on Private Practice; Article 77(1) the Constitution of Kenya, 2010.

The Kenyan laws are not against private practice or what it regards as gainful employment except under specific circumstances. Safe for the existence of such conditions, a Kenyan public officer is free to engage in private practice or have a second job. This is the position in the Kenyan Constitution and its Leadership and Integrity Act 2012. The Constitution of Kenya 2010, Article 77(1) provides thus: *A full-time state officer shall not participate in any other gainful employment*. A similar prohibition is made in section 26(1) of the Leadership and Integrity Act, No 19, 2012, thus: (1) Subject to subsection (2), a state officer who is serving on a full time basis shall not participate in any other gainful employment.

This provisions may seem like a blanket prohibition against second employment, but the definition of gainful employment proves otherwise. This is made clear by the Section 26(2) thus: *(2) In this section, "**gainful employment**" means work that a person can pursue and perform for money or other form of compensation or remuneration **which is inherently incompatible with the responsibilities of the State office** or which **results in the impairment of the judgement of the State officer in the execution of the functions of the** State office or results **in a conflict of interest in terms o**f section 16*.

According to the above provisions, a Kenyan state officer can engage in any other job except where the job:

a. is inherently incompatible with the responsibilities of the State office, or

b. results in the impairment of the judgement of the State officer in the execution of the functions of the State office, results in a conflict of interest

The above provision supports the argument that a blanket prohibition is inimical to economic progress of a nation. It also recognises that blanket prohibition inhibits to a great extent the feeling of self-worth and fulfillment derived from giving the utmost and deriving the best benefit within ones legitimate capacity (See Section 16 CRRN 1999 as amended; Zain A. A. et al, 2016: 5637).

It is worth noting that the above prohibition in the Kenyan Constitution is limited to State officers and not public officers. In other words, the law is drafted in a way to affect only persons who the level of authority their office command and responsibility of their office are highly exposed to conflicts of interest while engaging in a second job. *Article 260 of the Kenyan Constitution 2010* defines State office to mean: *President; (b) Deputy President; (c) Cabinet Secretary; (d) Member of Parliament; (e) Judges and Magistrates; (f) member of a commission to which Chapter Fifteen applies; (g) holder of an independent office to which Chapter Fifteen applies (h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government; (i) Attorney-General; (j) Director of Public Prosecutions; (k) Secretary to the Cabinet; (l) Principal Secretary; (m) Chief of the Kenya Defence Forces; (n) commander of a service of the Kenya Defence Forces; (o) Director-General of the National Intelligence Service; (p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or (q) an office established and designated as a State office by national legislation;*

This is unlike the Nigerian prohibition which in addition to similar offices listed under Article 260 of the Kenyan Constitution 2010 also puts a blanket ban on all staff of federal or state government funded universities, colleges and institutions from embarking private business, profession or trade (second employment) except farming. There are thus two but significant differences between ban on Public Officer second employment in Nigeria and a State Officer second employment in Kenya. Firstly, all the positions identified as State Offices are all included in the Nigerian definition of public officers except one- i.e. **"**All staff of universities, colleges and institutions owned and financed by the Federal or State Governments or local government council".

In essence, the Kenyan classification is aimed at isolating public officers who hold government positions as either political office holders, political appointees, or independent officers whose

position will in most circumstances not accommodate dual employment and most of whom have financial (discretionary) approval powers. This is not so with the Nigerian position as most staff of federal and state funded universities don't have this qualities. Secondly, under the Kenyan Constitution, restriction of the regulation against a specialized list of State officers, , only apply when the second employment is one where conflict of interest is likely, impairment of judgement is envisioned or when both jobs are inherently incompatible. The Nigeria provisions fails to provide a similar definition for "private business, profession or trade" thus making it a blanket prohibition against second employment.

An example may be a lawyer who is the director of public prosecutions who also has a private law firm where he accepts and defends clients facing criminal charges. Such a job will be inherently incompatible with ones position as a private defence lawyer who (or whose firm) also doubles as a Director of Public Prosecution for the government. But such will not be the case where one provides services as a solicitor for purely commercial transactions e.g. conveyancing, notary, lecturer. However, some of these positions may be regulated on the grounds of conflict of interest. The most important point from the above analysis is that the restriction is not blanket but conditional. This is an aspect that may be built into the Nigerian Legal System.

(b) Canadian Regulation on Second Employment.

The Canadian constitution, unlike Nigerian constitution does not specifically prohibit taking a professional employment while working for the government. Rather government employment codes of conducts stipulate the circumstances when an individual may not take up a second employment while working for government. It is the employee's discretion to report any perceived conflict or seek for advice from appropriate authority on the implication of the second employment to his or her role as a government employee. Once reported, it is the appropriate authority who should then determine whether there exist a potential, real or perceived conflict of interest. According to the ***Public Works and Government Services Canada Code of Conduct***[1]***,*** conflict of interest exists when there is: *"A situation in which an individual has other* ***competing financial, professional or personal*** *obligations or interests that* ***could interfere****, or* ***be perceived to interfere****, with his or her ability to* ***adequately perform required duties in a fair and objective manner****".*

From the above three important ingredients must exist for there to be a conflict of interest. In other words it is not sufficient that the government employee has other financial or professional interests. Such interests must be in competition with his or her employment. Competition in itself is also not sufficient, it must be shown that it could be perceived that the competing interest

[1] See Public Works and Government Services Canada Code of Conduct www.tpsgc-pwgsc.gc.ca

would interfere with the individual's fair and objective performance of his or her job. In other words, if the individual could objectively perform his job, irrespective of whether such job is in competition for the individual's time, there cannot be said to be a conflict of interest.

To further introduce objectivity, transparency and accountability to the process, the Public Works and Government Services Canada Code of Conduct, requires that all government workers submit a Conflict of Interest Declaration Form before engaging in outside work. The declaration is a requirement for all perceived real, apparent and potential conflict of interest. Thus where there is no real, potential or apparent conflict of interest, no declaration is required

RESOLVING THE NIGERIAN IMPASSE

Presently, most professionals in Nigeria, medical doctors, legal practitioners, civil engineers and others who can afford to set up private business (and who are staff of government funded universities. colleges and educational institutions), are engaged in one form of outside employment or the other. While this in itself is not wrong, a version of the interpretation of the Nigerian Constitution suggest that it is against the law. The question that should however be raised in determining the legality or otherwise of provision against outside employment should be "why the prohibition?"

A survey of external jurisdiction has demonstrated that the prohibition is intended to eliminate or at least reduce circumstances of real, potential or apparent conflict of interest while performing official duty as a government employee. Jack Maskell: 2[2]; Secondary Employment Policy, City and County of Swansea 1.2][3]. This means therefore that it is a desirable alternative to eliminate or reduce conflict of interest without imposing an ineffective total ban on outside employment. Currently, this is the ineffective position Nigeria finds itself.

The irony of the situation is that the exemption of farming, which to a large extent has a higher potential of conflict of interests both with government employees that work in various Ministries of Agriculture and the fact that farming is a serious business that requires time (see generally Jarkko et al (2006)), commitment and dedication (Government of Newfoundland and Labrador: 1), contradicts this objective. If this is the case, the question therefore is whether the exemption of farming is achieving its goal and whether it is raising circumstances of conflict of interests,

[2] See Codes of Conduct for Australian Public Service Employees; DPM Instruction No. 18-1, D.C. Official Code § 1-618.01 (2006 Repl.)

[3] See the Canadian and Kenyan positions discussed above. Government of South Australia, (2005) "Code of Conduct for South Australian Public Sector Employees" Commissioner for Public Employment Available at: http://www.wch.sa.gov.au/research/committees/humanethics/documents/code_of_conduct.pdf (accessed 16th October 2018)

particularly as defined by the *Public Works and Government Services Canada Code of Conduct* i.e. *competing financial, professional or personal obligations*.

The answer to this question will require further research. However, for purposes of this paper, suffice it to say that the present law is ambiguous and ineffective. There is thus need to develop a more effective and efficient legislation. This will mean a law that would eliminate and regulate conflict of interest situations without depriving Nigeria and Nigerians the benefits of hard work, economic diversification, ingenuity, sustainable development initiatives and particularly in this case, the opportunity for law lecturers to contribute to development of the law, legal reform and training of well-rounded legal practitioners (Albert et al , 1912: 256).

CONCLUSION AND RECOMMENDATIONS

As has been demonstrated above, the elimination of conflict of interests in government employment is a desirable objective. It amongst other benefits help to ensure effective and efficient utilisation of government resources. It also ensure that government resources are applied objectively and fairly to all citizens without undue interference by outside interest or impaired judgement. On the other hand, outside employment has quite positive contributions. It helps to ensure sustainable development, reduces dependence on government, improves professionalism and gives a sense of fulfilment and accomplishment to individuals. This translates to a sense of national fulfilment and satisfaction which also translates to an improved sense of self-worth and social harmony. The benefits on both side of the argument are desirable, however achieving them require a calculated approach.

The forgoing examples from Kenya and Canada, and the observed ineffectiveness of the Nigerian position, demonstrates that the issue is not the total prohibition of outside or second employment but in the regulation of outside employment to reduce its negatives and encourage its positives. Accordingly, regulation must be aimed at avoiding the demerits of outside or second employment while promoting the merits. As shown, the demerits are the possibility of conflict of interests, potential impairment of fair judgement and perception of interference. In other words, if a Nigerian regulation can be crafted to achieve this aim, such law should be promoted and the present position discarded.

Accordingly, it is herein recommended that:

1. A new regulation be introduced that will require disclosure of real and potential conflict of interests. This should include outside or second employment and all financial and professional interests that may lead to perceived or real impaired judgement or conflict of interest.

2. A stricter restriction should be placed on senior government officers and independent heads of Government Agencies and Parastatals including heads of universities and colleges especially all such public offices that have a high threshold of financial approval. Junior staff and all staff not having budgetary approval or independent decision making powers e.g. Lecturers in universities, colleges and institutions, should be removed from the definition of public officers for purpose of this prohibition.
3. Adapting the Kenyan and Canadian approach, all public officers (other than State officers) be required to disclose ***only*** when there are potential or real conflict of interests.
4. An independent body be established to investigate any conflict of interests and report to a different body (code of conduct tribunal /Attorney General) for prosecution where necessary.
5. Public and State Officers be given opportunity to explain any identified conflict of interest failing which enforcement procedure is commenced. It is also recommended that section 2(b) of the Code of Conduct for public Officers under the CFRN be amended to make the engagement in prohibition effective only upon existence of conflict of interest.
6. The words "conflict of interest" should also be defined along the line of Canadian and Kenyan provisions
7. To this end the following redrafting is recommended:
   Section 2(b) thus "*Without prejudice to the generality of the foregoing paragraph, a public officer shall not-… (b) except where he is not employed on full time basis engage or participate in the management of or running of any private business, profession or trade that may result in a* ***conflict of interest*** *but nothing in this sub-paragraph shall prevent a public officer from engaging in farming.*
   Conflict of interest here means "*"A situation in which an individual has other competing financial, professional or personal obligations or interests that could interfere, or be perceived to interfere, with his or her ability to adequately perform required duties in a fair and objective manner".*

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